IN THE

Supreme Court of The United States

October Term, 1970

No. 92

EDGAR D. WHITCOMB, GOVERNOR
of the State of Indiana

Appellant,

v.

PATRICK CHAVIS, et al.

Appellees.

On Appeal From The United States District Court
For The Southern District of Indiana,
Indianapolis Division

REPLY BRIEF FOR APPELLANT

I

The appellees rely heavily, in their brief, on admissions of fact which they claim were made by appellants, hereafter referred to as the state, in this case. The appellees filed their "Request for Admissions" numbering one hundred and eighteen (118), on February 4, 1969. The appellees claim that all one hundred and eighteen (118) of their requests for admissions from the state were in

fact admitted by the state. In reviewing the record in this case, the state notes that on March 7, 1969, a "Joint Report of Meeting Between Counsel", signed by trial counsel for the appellees and the state, was filed with the district court below. The record shows that:

> "3. Defense counsel then pointed out to plaintiffs' counsel that his copies of plaintiffs' requests for admissions had been logged in by the receptionist of the Attorney General's office on February 13, 1969 and not on February 4, 1969, the date of filing. Plaintiffs' counsel replied that service had been made personally by plaintiffs' counsel on February 4th and that the acknowledgment of service had been signed by a Deputy Attorney General on that day. Defense counsel suggested that the late logging should at least establish his personal good faith in the matter and plaintiffs' counsel agreed. The requests for admissions were then discussed with the following results:
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> A. Requests numbered 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 13, 14, 15, 16, 17, 18, 19, 21, 26, 39, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 109, 110, 111, and 112 are to be taken as admitted.
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> B. The following requests are admitted as amended to read as follows:
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> 3. That the census tracts listed in Request for Admission No. 2, supra, are in a cluster which is bounded by the streets and other landmarks in the manner described in the first paragraph of Memorandum 4 on page 18 of the complaint if lines six and seven of the said paragraph were to be amended. The said lines six and seven of the said paragraph now read:
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> sylvania Avenue to 34th Street and then east on 34th Street to Keystone Avenue and then south on Keystone Avenue to 30th

And should be amended to read:

sylvania avenue to 34th Street and then east on 34th Street to Central Avenue and then south on Central to Fall Creek and then north east on Fall Creek to 34th Street and then east on 34th Street to Keystone Avenue and then south on Keystone Avenue to 30th . . .

11. That the 1960 census showed the aforesaid 1960 Ghetto Area to contain about 40.45% of the dilapidated housing units in Marion County as defined by the 1960 census.

28. Admits no local option in Indiana.

41. That Marion County and Lake County are the only two counties in the State of Indiana which have 50,000 negro inhabitants.

80. That as of the 1960 Census, Marion County Outside Indianapolis contained about 14.43% of the deteriorating or dilapidated houses in Marion County as defined by the 1960 Census.

101. That the table appearing on page 64 of the complaint contains accurate statements as to the number of General Assembly Senators and Representatives allotted to Marion County, Indiana during the apportionments which took place during the years listed although one apportionment is not covered.

108. That the table appearing on page 68 of the complaint contains a correct portrayal of the number of bills successfully sponsored by Senators of the Defendant General Assembly who were incumbents when elected to the terms they were serving and by Senators who were not incumbants when elected to the terms which they were then serving.

C. The following requests are denied tentatively until defense counsel has had the opportunity to study

a booklet by the Community Service Counsel of Metropolitan Indianapolis. It is probable that they will be admitted but defense counsel has in no way committed himself: 23, 24, 25, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 40.

D. The following request is denied tentatively until defense counsel has had the opportunity to study the Kerner Report. It is probable that it will be admitted but defense counsel has in no way committed himself: 44.

E. The following requests are denied tentatively until and unless defense counsel receives a letter from the Honorable Charles S. White of the Indiana Appellate Court who drew the existing districts of the defendant General Assembly representing that the facts suggested in the said requests are correct. Upon receipt of such a letter it is probable that the said requests will be admitted but defense counsel has in no way committed himself: 90 & 92.

F. The following requests are denied without qualification and plaintiffs' counsel agree that the denials are appropriate and in good faith: 20, 22, 27, 55, 56, 61, 62, 63, 64, 65, 94, 102, 113, 114, 115, 116, 117, and 118.

"It is further agreed among counsel for all the parties that where the terms "Ghetto Area", "Ghetto Voting Area" and other such terms and the term "White Suburban Belt" appear in the pleadings in this cause, they are to be read as appearing in quotes."

The appellees rely upon certain of these so called admissions of fact to support the arguments made in their brief. After each so called admission of fact, the appellees have inserted a number in brackets corresponding to the numbers appearing in their "Request for Admissions." See footnote number 4 on page 9 of the voter's brief. As the

joint report shows, not all of those requests were in fact admitted. Requests numbered 22, 55, 56, 61, 62, 63, 64, 65, 112, 113, 114, 115, 119, cited by the appellees in their brief as being admitted were in fact unqualifiedly denied by the state, as is indicated in the joint report. Furthermore, as is indicated in sub-paragraph F of the joint report, the appellees stipulated that the state's denial was in good faith. Also, requests numbered 29, 31, 32, 33, 35, 36, 37, 90, and 92, cited in the appellees' brief as being admitted, were tentatively denied, us indicated in the joint report. A search of the record does not disclose that those requests tentatively denied were in fact ever admitted. Admittedly, this is a technical matter, one in which the state does not place great store in a case of this sort. The issues are complex and involve an interpretation of supposed facts having high speculative value. For instance, the appellees allege that the state conceded the validity of "Banzhaf's analysis." This Court could hardly be bound by admissions by the parties regarding the validity of "Banzhaf's analysis." The analysis is at best philosophical and is a matter which could only be determinatively passed upon by this Court, notwithstanding admissions by the parties in this case.

In the same vein, the appellees in footnote number 5, at page 16 of their brief, refer to the case of *Bryant v. Whitcomb,* United States District Court for the Southern District of Indiana, Indianapolis, Division, Cause No. IP 69-C-115, February 3, 1970, to show that even Negro legislators from Marion County vote against the interests of the majority of the Negroes in the county. The appellees refer to what is known in this State as the Unigov Bill. The Unigov Bill extended the boundaries for the City of Indianapolis to the County line so that instead of having a

city and county government in Marion County there is now but one municipal governing unit. The appellees claim that "[t]his statute subsequently was declared unconstitutional in part in three respects because it constituted a black voting rights violation" and that ". . . no appeal from Judge Steckler's decision because of said black voting rights violations were acknowledged." This is simply not so as a reading of Judge Steckler's opinion will indicate.

And finally, the appellees claim that a bill permitting an all-white part of Gary to secede from Gary as a response to the recent election of a Negro mayor never became law only because it was stolen from a stack of bills being transmitted to the Office of the Governor of Indiana for signing. There is nothing in this record regarding this matter. It has no bearing on this case. At best it is an unverified scandalous allegation. The sole support for the veracity of this claim is the appellee's assertion in their brief that it occurred.

II.

The district court found that the Marion County multi-member district was unconstitutional because it operated to minimize and cancel out the vote of the residents of the Center Township Ghetto. Secondly, the district court found that the Marion County multi-member district was unconstitutional because the vote of a resident of Marion County was worth more than the vote of a resident of a single member district, or for that matter any smaller multi-member districts electing fewer legislators. The first finding of the district court was based on social, racial and economic factors and upon the distribution of elected legislators within the Marion County District. The second finding was based solely upon the testimony of John

Banzhaf in the district court and an article written by him appearing at 75 Yale Law Journal 1319 (1966).

It should be noted that "Banzhaf's Analysis," relied upon by the district court and by the appellees provides the basis for the second finding of the court that an apportionment scheme of districts whose sizes differ violates the one-man one-vote principles of this Court, even though the ratio of legislators to population are the same for each district.

(a) The Voters Present No Sound Argument To Rebut Arguments Of The State That the District Court Erred When It Found That the Marion County Multi-Member District Unconstitutionally Diluted The Vote Of A Cognizable Racial Majority Within Marion County.

The decision of the district court was based on findings that legislators elected from Marion County were not distributed throughout Marion County in such a way that a proportionate number of legislators resided within an area designated by the district court as the Center Township Ghetto, a cohesive racial minority declared to exist by the court. The appellees apparently concede that the district court erred when it based its decision upon the location of the residence of legislators elected from Marion County. As a matter of fact, the appellee's position apparently is that the district court's analysis is completely erroneous in every respect but for its conclusion that the Marion County multi-member district unconstitutionally dilutes the vote of a cognizable racial minority residing within Marion County. The appellees aver, at page 3 of their brief, that:

> "Certain negative descriptions of appellee's case are appropriate to this summary. Appellees do not contend that the race or ethnic background of legislators can have anything but the most minimal signifi-

cance in determining whether the citizens of a given locality are entitled to have a multi member legislative district broken up. Appellees likewise do not contend that any demonstration as to where the elected representatives live within a multi-member legislative district can constitute a conclusive or near-conclusive showing that any voting rights dilution results from such a district. Finally, appellees do not contend that minority groups are entitled to have district lines drawn in such a manner as to enhance their voting power. To the extent that the appellants and amici have suggested that the appellees are relying on the three foregoing possible contentions they have mischaracterized the appellee's case."

Evidence was introduced by the appellees and the state at the trial of this cause. At the conclusion of the trial, the district court made a decision and entered its judgment. The basis for that decision is set out in the district court's opinion. The district court sorted out the evidence and selected those matters upon which it would rely. Inferentially, the evidence upon which the district court relied was found to be relevant. But the evidence upon which the district court did not rely, it found to be irrelevant or of no probative value. Now the appellee's position is that the district court relied upon the wrong evidence and in so doing erred. Thus, both the appellees and the State agree that the basis for the decision of the district court was erroneous.

The appellees have elected to argue that evidence not relied upon by the district court nevertheless supports the decision of the district court. Inferentially, the district court, in refusing to rely upon the evidence upon which the appellees rely, found that the evidence upon which the appellees rely in their brief had no probative value. Hence,

this Court need not take cognizance of the purported facts upon which appellees rely in their argument.

Turning to the appellee's argument, in addition to relying upon facts rejected by the district court, it relies upon facts purportedly admitted by the state, but some of which, as the state has already pointed out, were denied by the state. Secondly, at best the appellees can only be regarded as arguing that there is within Marion County a relatively cohesive group of residents whose interests differ significantly from the residents of the rest of the County. The argument is hardly sufficient to justify the district court's decision that the Marion County multi-member district unconstitutionally diluted the vote of that group. The appellees have done no more than discover a special interest group. As the state has already argued in their opening brief, the interest group discovered by the appellees in this case is entitled to no more consideration than any other interest group within Marion County or the State. And finally, neither the appellees nor the district court has been able to show that the interest of the Ghetto are interests solely of the Ghetto. Rather, the evidence shows that the interests of the Ghetto are indeed interests of the County and interests of the State at large. For instance, it has been the State Legislature, not the Ghetto, which has enacted unemployment compensation laws, welfare laws, minimum wage laws and civil rights laws to name just a few. See the appellee's "Complaint for Civil Action", "Memorandum 7" at pages 41 and 42 of the Appendix where the appellee's have summarized some of the legislation enacted by the State Legislature directly benefiting Ghetto residents. Moreover, the State submits that the legislation to which the appellees refer is in fact evidence that the interest of the Ghetto are interests of the

state and that the interests of the Ghetto are not ignored, but rather have a significant weight in the legislature.

(b) Banzhaf's Analysis Is Not A Sound Basis Upon Which To Conclude That A Mixed Apportionment Scheme Of Districts Of Differing Sizes Is Unconstitutional.

In its opening brief, the State argued that one basis for the district court's decision that the Marion County multi-member district was unconstitutional was that a voter residing in the Marion County multi-member district had greater voting power than the vote of a resident of a single member district or than the vote of a resident of a smaller multi-member district. This the appellees concede in their answer brief beginning at page 12. See also an article by Robert G. Dixson, Jr. "The Warren Court Crusade for The Holy Grail of 'One Man-One Vote'" *The Supreme Court Review* (1969) 219, 261. Thus, the state submits that the district court effectively held that any state apportionment scheme providing for the election of legislators from districts of varying sizes was unconstitutional *per se*.

The appellees argue that "Banzhaf's Analysis" provides an adequate theoretical basis for the decision of the district court. It should be noted that the district court did not squarely adopt Banzhaf's Analysis. Banzhaf's Analysis applies mathematically complex equations to a concept denominated a "critical vote." The district court did not make use of the complex mathematical equations employed by Banzhaf to make his point. The district court took Banzhaf's critical vote concept standing alone and applied it to the Indiana apportionment scheme. A critical vote is one voter's opportunity to cast a deciding vote, that is to say, break a tie. According to the district court,

the larger the district, the more critical votes a voter might cast and, hence, the greater his voting power as compared to a voter in a single member district. The traditional view of voting power heretofore impliedly applied by this Court was that the voter of a multi-member district has an advantage over the voter in a single member district because he may vote for more legislators, but that this advantage is offset by the fact that he is a part of a larger electorate. See 75 *Yale Law Journal* 1308, 1311 (1966), footnote 24.

One view of the district court's decision is that it is contrary to the decisions of this Court impliedly accepting and applying what the state denominates as the traditional view. Another view of the decision of the district court, in this regard, is that it is a variation of Banzhaf's Analysis. In either event the reasoning of the district court is unsound.

The very core of Banzhaf's Analysis is the concept denominated by him as a critical vote, sometimes referred to as a deciding vote. A critical vote as defined by Banzhaf is a tie breaking vote. In an election between two candidates in a district of X number of voters, based on the laws of chance, there are Y number of ways in which the voters might combine. Of Y number of combinations, a percentage of those will differ by one vote. The larger the district, the greater the number of combinations, but the lesser the percentage of combinations in which a candidate might win by one vote. In other words, of the votes cast in an election between two candidates, the outcome of the election might be decided by one vote in a fixed percentage, depending upon the number of votes being cast. Furthermore, as the size of the district increases, any given voter's chance to cast a critical vote decreases but

at a rate less than the proportionate increase in the number of legislators running for a seat from that district. The state submits that Banzhaf's Analysis is not a sound basis upon which to require uniform districts.

Banzhaf's Analysis breaks down at a number of different points. The basic question is whether the concept of a critical vote is meaningful. Can one voter ever cast a deciding vote? Once the votes are cast, counted and a candidate elected, can any one of the votes cast for the winning candidate be said to count more than any other vote for the winning candidate? The critical vote concept is a mirage. Looking forward, before the votes are cast, Banzhaf theorizes that where an election is decided by one vote, that one vote counts more. On the other hand, looking backward, after all the votes have been cast, all votes for a winning candidate count the same, even though a candidate may have been elected by a margin of one vote. For example, where the winning candidate receives one hundred votes (100) and the losing candidate receives ninety-nine (99) votes, all one hundred (100) votes count for the same. Not one of the one hundred (100) votes cast counts for more. Yet Banzhaf's Analysis is valid and relevant only if one vote counts for more than another, that is to say, only if the one vote difference counts for more than all the other votes cast for the winning candidate.

Even if the concept of a critical vote could somehow be regarded as meaningful, the analysis is still defective. Banzhaf's Analysis is grounded on one voter's theoretical opportunity or chance to affect the outcome of an election by casting the "deciding vote". Banzhaf's Analysis only provides us with a means, an instrument, with which to determine the percentage of combinations in which one

candidate would receive one more vote than the losing candidate. The state submits that an additional computation must be made to show the probability that any given election between two candidates might be decided by one vote. If the probability that an election between two candidates will be decided by one vote is miniscule, then the phenomenon to which Banzhaf addresses himself may never occur. Elections between two candidates involving thousands of voters, decided by one vote, are so rare as to make Banzhaf's Analysis meaningless.

The relevance of Banzhaf's Analysis turns in part upon the tendency of legislators elected from a multi-member district to vote as a bloc. The testimony in the court below was that slating, the strength of county political parties and the influence of the county chairman tended to produce bloc voting among the legislators elected from Marion County. Banzhaf testified that if legislators elected from Marion County voted more or less independently on most issues, the problem of unequal voting power did not arise, even though the legislators were elected at large. (A. p. 142) Thus, inferentially, as long as legislators elected from Marion County vote as a bloc, the ultimate voting power of those electing them is greater, even if the Marion County legislators were elected from single member districts. Implicit in the district court's decision to break up the Marion County multi-member district was a conclusion that by breaking up the district, the power of the county political organizations and the county chairman would also be broken. There is no reason to suppose, nor is there evidence to support a conclusion, that that result would obtain. Rather, the state submits that slating would go on and that the county political parties and their chairman would continue to exert strong influence on the vot-

ing patterns of legislators elected from Marion County, even if elected from single member districts. There is no reason to suppose that legislators elected from single member districts within Marion County would not vote as a bloc on significant issues. If the evil is bloc voting by Marion County legislators, breaking up the Marion County multi-member district will not achieve the end for which it was designed.

More could be said regarding the validity and soundness of Banzhaf's Analysis. Suffice it to say that Banzhaf's Analysis is so speculative as to provide a wholly inadequate and unsound basis upon which to decide a case as significant as this.

III.

In part III of their brief the appellees address themselves to certain issues raised and arguments made by the state in its opening brief. The voters say little in this section of their brief which requires a rebuttal.

In sub-part A the appellees argue that the district court did not freeze in place the geographical and political integrity of the voters of the "Center Township Ghetto." However, the appellees ignore the clear pronouncements of the district court that it did in fact take cognizance of the Ghetto when it reapportioned the State. See pages 395 and 396 of the Appendix and page 34 of the state's opening brief. What is more, the district court had no choice but to take cognizance of the location of the Ghetto. It was the supposed dilution of the vote of the residents of the Ghetto which led to the court's decision. To ignore the location of the residents of the Ghetto would be to say no less than that, although the residents of the Ghetto had

suffered a violation of their constitutional rights, there was no remedy which the district court could afford them. The only way the district court could repair the constitutional deprivation which it found to exist was to take cognizance of the location of the residents of the Ghetto. This state of affairs squarely raises the spectre of gerrymandering. The decision of the district court in this respect raises an irreconcilable dilemma. On the one hand, to redistrict Marion County with a view to the location of the residents of the Ghetto can be no less than gerrymandering. On the other hand, to wholly ignore the location of the residents of the Ghetto is to afford them no relief for the wrongs supposed to exist by the district court.

In sub-part C of their brief, the appellees concede that the 1960 census figures did not provide a sound basis upon which to reapportion the state on the eve of the 1970 census, as argued by the state. In sub-part D, the appellees concede that the Marion County multi-member district was not designed to cancel out the strength of racial or political elements of the voting population.

The appellees present nothing in sub-parts B and E requiring a rebuttal from the state.

CONCLUSION

The decision of the district court in this case is unsound. The district court erred and must be reversed.

Respectfully submitted.

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